

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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LANCE IAN OSBAND,
Petitioner,

v.

ROBERT L. AYERS, Jr., Warden of
San Quentin State Prison,

Respondent.

NO. CIV. 97-152 WBS KJM
CAPITAL CASE

MEMORANDUM AND ORDER RE:
PETITIONER'S REQUEST FOR
RECONSIDERATION OF THE
MAGISTRATE JUDGE'S ORDER FILED
JUNE 13, 2008

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One June 13, 2008, the assigned Magistrate Judge ordered petitioner Lance Osband to make a three-part showing for each portion of the transcript and exhibits from an evidentiary hearing that he seeks to have sealed from the public. Petitioner now moves for reconsideration of that Order pursuant to 28 U.S.C. § 636(b)(1)(A).

I. Factual and Procedural Background

Petitioner was convicted of first-degree murder in California state court and sentenced to death in 1988. (May 11, 2005 Order (Docket No. 169) 12:5-6.) His conviction was affirmed

1 on appeal, People v. Osband, 13 Cal. 4th 622 (1996), and the
2 United States Supreme Court denied certiorari, Osband v.
3 California, 519 U.S. 1061 (1997). Following denial of his state
4 habeas petition, petitioner filed his federal habeas corpus
5 petition in this court. (May 11, 2005 Order 12:11-15.) His
6 petition asserts claims of ineffective assistance of counsel,
7 including a claim that his counsel failed to adequately develop
8 evidence of his mental health.

9 The Magistrate Judge previously assigned to this case
10 granted respondent discovery of trial counsel's file and the
11 records of two mental health examiners but issued a protective
12 order declaring such discovery confidential and prohibiting
13 disclosure to other persons or agencies. (Aug. 10, 2000 Order
14 (Docket No. 68) 4:3-13.) That protective order was subsequently
15 upheld on appeal. Osband v. Woodford, 290 F.3d 1036 (9th Cir.
16 2001).¹

17 At the time of the evidentiary hearing on petitioner's
18 claims, which began on April 23, 2007, the Magistrate Judge now
19 assigned to this case determined that the protective orders
20 governing discovery did not apply to documents and evidence
21 submitted during the hearing. (Apr. 24, 2007 Order (Docket No.
22 417) 4:3-5.) The Magistrate Judge attempted to set out a
23 procedure for protecting testimony and evidence that should be
24 sealed, but it proved unworkable. (See Oct. 27, 2007 Order
25 (Docket No. 452) 1:24.) Consequently, in light of the lack of

26
27 ¹ The Magistrate Judge later replaced the original
28 protective order to address respondent's deposition or interview
of trial counsel. (June 14, 2006 Order (Docket No. 271) 2:4-
3:4.)

1 public interest in attending the hearing, the Magistrate Judge
2 ordered the hearing closed and the transcript temporarily sealed
3 during the testimony of trial counsel and a jury consultant.
4 (Id. 1:24-2:1.) The question of which portions of the transcript
5 and exhibits would remain sealed was postponed until after the
6 hearing. (Id. 2:1-4.)

7 After receipt of the final transcript, the Magistrate
8 Judge informed the parties of her analysis of the legal bases for
9 permitting portions of the transcript to remain sealed given the
10 public's right of access to judicial proceedings. (Id. 2:7-
11 5:11.) The Magistrate Judge tentatively identified those
12 portions she found should remain sealed. (Id. 5:13-16.) The
13 parties were then ordered to brief the issue of sealing the
14 hearing transcript and/or exhibits. (Id. 6:4-17.)

15 Following briefing and oral argument, the Magistrate
16 Judge issued the June 13 Order, which identified the showing
17 required of the petitioner to overcome the public right of access
18 and keep portions of the hearing transcript and exhibits sealed.
19 (June 13, 2008 Order (Docket No. 513) 6:24-25.) Specifically,
20 the Magistrate Judge ordered that for all portions of the record
21 sought to be kept sealed, petitioner must show: "(a) the
22 relevance of the information he seeks to seal to an issue which
23 may be raised on any retrial, (b) the likelihood that the issue
24 may be raised on any retrial, and (c) the prejudice he could
25 suffer should that information be revealed." (Id. 22:15-23:7.)

26 II. Discussion

27 A. Standard of Review

28 The court must defer to a non-dispositive order entered

1 by a magistrate judge unless it is "'clearly erroneous or
2 contrary to law.'" Grimes v. City & County of S.F., 951 F.2d
3 236, 241 (9th Cir. 1991) (quoting Fed. R. Civ. P. 72(a)); see 28
4 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any
5 pretrial matter . . . where it has been shown that the magistrate
6 judge's order is clearly erroneous or contrary to law."). The
7 "contrary to law" standard amounts to de novo or plenary review
8 of questions of law. See Osband v. Woodford, 290 F.3d 1036, 1041
9 (9th Cir. 2002); Haines v. Liggett Group Inc., 975 F.2d 81, 91
10 (3d Cir. 1992). Since the issues raised by this motion involve
11 only questions of law, the court reviews the Magistrate Judge's
12 order de novo.

13 B. Effect of the Protective Order

14 Different standards of confidentiality apply to
15 materials gathered and disclosed during discovery on the one hand
16 and materials filed with the court in connection with a
17 dispositive action on the other. See Baxter Int'l. v. Abbott
18 Labs., 297 F.3d 544, 545 (7th Cir. 2002). In general, parties to
19 an action can prevent public disclosure of discovery materials
20 simply by showing good cause that a protective order should
21 issue. Phillips v. G.M. Corp., 307 F.3d 1206, 1210 (9th Cir.
22 2002). The strong presumption of public access does not apply to
23 such materials. Id. at 1213; Chicago Tribune Co. v.
24 Birdgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir.
25 2001).

26 Once raw discovery materials are filed with the court
27 in connection with a motion seeking action by the court, however,
28 their status changes. Rushford v. New Yorker Magazine, Inc., 846

1 F.2d 249, 252 (4th Cir. 1988). Such materials have then entered
2 the judicial record, and they are subject to the presumption of
3 public access, under which different requirements must be
4 satisfied to keep the materials confidential. See Foltz v. State
5 Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135-36 (9th Cir. 2003);
6 Chicago Tribune Co., 263 F.3d at 1312; Rushford, 846 F.2d at 253.

7 In this case, materials related to petitioner's claims
8 of ineffective assistance of counsel discovered pursuant to the
9 protective order became part of the judicial record when they
10 were submitted as part of the evidentiary hearing. Consequently,
11 despite the fact that those materials were produced pursuant to a
12 protective order, the court must now consider the public right of
13 access in deciding continue to maintain them under seal. See
14 Rushford, 846 F.2d at 252-53 (holding that even documents
15 specifically covered by a protective order during discovery must
16 be unsealed, absent an overriding interest, when attached to a
17 dispositive motion). The Magistrate Judge thus did not act
18 contrary to law by considering whether the public right of access
19 requires the court to unseal the entire record of the evidentiary
20 hearing.²

21
22 ² The Magistrate Judge's consideration of the public's
23 right of access to the evidentiary hearing was also proper even
24 though no outside party had requested access. So long as a
25 litigant seeks to seal court records, a court must determine
26 whether the public's right of access precludes such closure. See
27 Pintos v. Pac. Creditors Ass'n, 504 F.3d 792, 802 n.8 (9th Cir.
28 2007); see also Citizens First Nat'l Bank of Princeton v.
Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) ("The
judge is the primary representative of the public interest in the
judicial process and is duty-bound therefore to review any
request to seal the record (or part of it)." (citing Arthur R.
Miller, Confidentiality, Protective Orders, and Public Access to
the Courts, 105 Harv. L. Rev. 427, 492 (1991))).

1 The Ninth Circuit's holding in Bittaker v. Woodford,
2 331 F.3d 715 (9th Cir. 2003) (en banc), does not demand a
3 different result. In Bittaker, the Ninth Circuit upheld the
4 district court's protective order in a habeas case prohibiting
5 the state Attorney General from disclosing any discovery
6 materials protected by the petitioner's attorney-client privilege
7 to any other persons or offices. Id. at 717, 728. While the
8 Court of Appeals discussed the risks to a successful petitioner's
9 fair trial rights on retrial if privileged material was disclosed
10 during the habeas litigation, id. at 723 n.7, its holding was
11 limited to the validity of the protective order regarding the
12 fruits of discovery, id. at 728. Because the Ninth Circuit did
13 not address the issue of disclosure of materials discovered
14 pursuant to a protective order but submitted in connection with a
15 merits hearing, Bittaker does not obviate the need to assess the
16 public's right of access in the circumstances of this case.

17 C. The Public Right of Access

18 The public right of access to judicial proceedings and
19 records is grounded in both the First Amendment and common law.
20 CBS, Inc. v. U.S. Dist. Court, 765 F.2d 823, 825 (9th Cir. 1985).
21 The right was developed under both sources to serve similar goals
22 of facilitating public oversight and informed discussion of the
23 courts and reinforcing legitimacy. See Cal. First Amendment
24 Coal. v. Woodford, 299 F.3d 868, 874 (9th Cir. 2002); Valley
25 Broad. Co. v. U.S. Dist. Court, 798 F.2d 1289, 1293 (9th Cir.
26 1986).

27 Neither the common law or First Amendment right of
28 access is absolute. Under the common law, the party seeking

1 closure can overcome the presumption of access by showing
2 "sufficiently compelling reasons for doing so." Foltz, 331 F.3d
3 at 1135 (citing San Jose Mercury News, Inc. v. U.S. Dist. Court,
4 187 F.3d 1096, 1102 (9th Cir. 1999)). This standard has been
5 described as a "balancing test," San Jose Mercury News, 187 F.3d
6 at 1102, in which the court must weigh such factors as the
7 "public interest in understanding the judicial process and
8 whether disclosure of the material could result in improper use
9 of the material for scandalous or libelous purposes or
10 infringement upon trade secrets." Hagestad v. Tragesser, 49 F.3d
11 1430, 1434 (9th Cir. 1995) (citing E.E.O.C. v. Erection Co., 900
12 F.2d 168, 170 (9th Cir. 1990)).

13 The First Amendment framework similarly requires the
14 court to "carefully balance [competing] interests." Phoenix
15 Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940, 949 (9th Cir.
16 1998). The constitutional right of access "can be overcome only
17 by an overriding right or interest 'based on findings that
18 closure is essential to preserve higher values and is narrowly
19 tailored to serve that interest.'" Oregonian Pub. Co. v. U.S.
20 Dist. Court, 920 F.2d 1462, 1465 (9th Cir. 1990) (quoting Press-
21 Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984)). "'The
22 interest is to be articulated along with findings specific enough
23 that a reviewing court can determine whether the closure order
24 was properly entered.'" Id.

25 In the June 13 Order, the Magistrate Judge only set
26 forth the showing that petitioner must make to enable the
27 Magistrate Judge to balance competing interests and determine if
28 the public right of access has been overcome. That order was

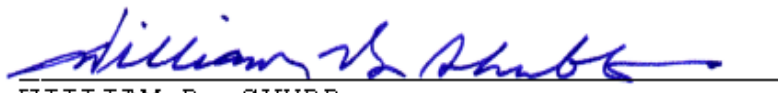
1 neither clearly erroneous nor contrary to law. The court cannot
2 determine at this point, however, whether the Magistrate Judge's
3 eventual order concerning unsealing will indeed satisfy the
4 requirements of either the First Amendment or the common law
5 frameworks. Accordingly, given the immediate injury that
6 petitioner could suffer if confidential information prejudicial
7 to his retrial were to be disclosed to the public even
8 temporarily, the court allow the Magistrate Judge to proceed as
9 scheduled, but order that no portions of the record which have
10 previously been sealed be unsealed until this court has had an
11 opportunity to review the Magistrate Judge's final unsealing
12 order.

13 IT IS THEREFORE ORDERED that petitioner's motion for
14 reconsideration be, and the same hereby is, DENIED.

15 IT IS FURTHER ORDERED that the record of the
16 evidentiary hearing be kept under seal until this court has
17 reviewed the Magistrate Judge's unsealing order.

18 IT IS FURTHER ORDERED that this matter be, and the same
19 hereby is, REMANDED to the Magistrate Judge to consider which, if
20 any, portions of the transcript and exhibits from the evidentiary
21 hearing should be unsealed.

22 DATED: January 29, 2009

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24 
25 WILLIAM B. SHUBB
26 UNITED STATES DISTRICT JUDGE
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